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NG POH KWANG

v.

TAN CHUAN YONG & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[CIVIL SUIT NO: S-22-584-2008]
9 JUNE 2013

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TORT: *Negligence - Professional negligence - Solicitor and client - Plaintiff suffered loss due to solicitors' action - Breach of contractual duty - Whether plaintiff's claim time-barred - Whether solicitors discharged from acting for plaintiff - Failure to pay legal fees - Whether solicitor had right to withhold plaintiff's documents - Whether there was a break in chain of causation - Damages - Whether proved - Legal Profession (Practice and Etiquette) Rules 1978, r. 55*

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The third defendant, a firm of advocates and solicitors, was retained by the plaintiff to demand a sum of RM454,723.27 for the outstanding professional fees owed by Olympia Land Bhd ('OLB') to the plaintiff. The first and second defendants were the partners of the third defendant. In respect of the dispute between OLB (the party being sued) and the plaintiff, an arbitration proceeding was commenced. However, on 5 January 2001, OLB's solicitors wrote to the arbitrator raising a preliminary issue that the arbitration had been commenced against the wrong party. On 10 January 2001, the arbitrator heard the preliminary objection and decided that the issue raised was a question of law and therefore, the matter was referred to the High Court. On 10 September 2001, the third defendant informed the plaintiff that unless their outstanding bills were settled, the third defendant would not be able to continue acting for him. The plaintiff replied that the third defendant's fees were too high and that they would appoint another lawyer to act for them. Thereafter, a new firm of solicitors was appointed to act for the plaintiff and the court allowed the third defendant's application to discharge itself from acting for the plaintiff. The sealed discharge order was then served on the plaintiff. As for the suit commenced in the High Court, it was decided, on 16 April 2003, that the plaintiff did not have a cause of action against OLB since OLB was the agent and employee of MB Properties Sdn Bhd ('MB Properties'). In relation to this, the plaintiff claimed for damages against the defendants for professional negligence and breach of contractual duty on the

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defendants' part. The plaintiff pleaded that due to the defendants' breach, *ie*, failure to determine MB Properties as the respondent and failure to forthwith amend the statement of case, the plaintiff was thus denied the opportunity to amend the statement of case after the decision of the High Court and thus, the claim for the sum of RM454,723.27 was time-barred. On the contrary, the defendants contended that the plaintiff's claim herein was time-barred since the plaintiff's right to bring this action was until 9 January 2007, *ie*, six years from the date of the commencement of the alleged cause of action which ran from 10 January 2001 (the date when the plaintiff discovered the defendants' act of negligence).

Held (dismissing plaintiff's claim with costs):

(1) The plaintiff's cause of action accrued when the High Court had, on 16 April 2003, made the declaration that the plaintiff had sued the wrong party. Thus, the plaintiff's right to bring the action only expired on 15 April 2009. Since the writ of summons was filed on 12 May 2008, the plaintiff's action was not time-barred. (para 9)

(2) The defendants' obligation under tort ceased upon the service of the discharge order on 30 May 2002. Further, the second defendant, as a solicitor retained by the plaintiff, had a right to withhold the client's documents to protect their lien on the legal fees especially when she had been discharged by the plaintiff to act for him in accordance with r. 55 of the Legal Profession (Practice and Etiquette) Rules 1978 (*Trikkon Sdn Bhd v. Mahinder Singh Dulku*; foll). (para 15)

(3) Based on the documents submitted by the plaintiff to the defendants, any reasonable competent solicitor would have concluded that OLB was the rightful respondent because OLB was the contracting party in light of the documents provided. However, when the High Court decided that OLB was the agent and employee of MB Properties, there were more documents before it which the plaintiff failed to provide to the defendants at the time the latter issued the letter of demand and when the defendants initiated the arbitration proceedings against OLB. Hence, the defendants had not failed to ascertain the proper party for the arbitration and there was no breach of their contractual or tortious obligations towards the plaintiff. (para 29)

(4) By causation, the plaintiff must show that there was a causal link between the loss he had suffered and the defendants' wrongdoing. Applying the principle of material contribution, it was noted that there were many intervening acts which occurred from the raising of the preliminary objection by OLB on 10 January 2001 till the High Court's decision on 16 April 2003. Further, there was a break in the chain of causation through the defendants' discharge and the appointment of the new solicitors by the plaintiff. (paras 35 & 38)

(5) It was for the plaintiff to prove orally and by documentary evidence that the sum of RM454,723.27 claimed by him in fact constituted the outstanding architect/consultant fees payable under the letter of appointment for works done and services rendered to his client. This was, however, not proved by the plaintiff. (para 43)

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***

Caparo Industries Plc v. Dickman and Others [1990] 1 All ER 568 ***(refd)***

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd [2004] 1 CLJ 357 CA ***(refd)***

Credit Corp (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

Hughes v. Hughes [1958] 224 CA ***(refd)***

In re Faithfull, And In re London, Brighton, And South Coast Railway Company [1868] Equity Cases Vol VI 325 ***(refd)***

Maelstrom Resources Sdn Bhd & Anor v. Shearn Delamore & Co And Another Case [2007] 1 CLJ 50 HC ***(refd)***

Midland Bank Trust Co Ltd & Anor v. Hett, Stubbs & Kemp [1978] 3 All ER 582 ***(refd)***

Tan Sri Datuk Ibrahim Mohamed v. Leong Tuck Onn & Anor [2012] 6 CLJ 662 HC ***(dist)***

Trikkon Sdn Bhd v. Mahinder Singh Dulku [2010] 5 CLJ 850 HC ***(foll)***

Victor Cham & Anor v. Loh Bee Tuan [2006] 3 CLJ 770 CA ***(refd)***

Wong Kiong Hung & Anor v. Chang Siew Lan & Another Appeal [2009] 3 CLJ 751 CA ***(foll)***

Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 1 CLJ 409 FC ***(foll)***

Legislation referred to:

Legal Profession (Practice and Etiquette) Rules 1978, r. 55

Limitation Act 1953, s. 6(1)(a)

Rules of Court 2012, O. 64 r. 5(1)

Other source(s) referred to:

Winfield and Jolowicz on Tort, 2006, 17th edn, p 267

For the plaintiff - Freddy Lim (YS Leong with him); M/s San Leong
For the defendants - Jane Pragasam (Felicia Ho & Elizabeth Voral with her); M/s Ho-Noecker & Pragasam

Reported by Kumitha Abd Majid

JUDGMENT

Lau Bee Lan J:

[1] The plaintiff, Ng Poh Kwang is an architect carrying on practice as Messrs Ng Poh Kwang Chartered Architect and was at the material time a client of the defendants. The first and second defendants are the partners of the third defendant, Messrs Tan Chuan Yong & SM Chan. The plaintiff alleged (i) that the third defendant was retained by him to demand for a sum of RM454,723.27 for his outstanding professional fees from Olympia Land Bhd; (ii) that the defendants had breached their duties in performing the legal services; and (iii) he suffered loss as a result of the defendant's breach of contract and/or negligence. Hence this action by the plaintiff for damages against the defendants for professional negligence.

[2] In its defence the defendants essentially denied they were negligent. Further that the plaintiff is estopped from taking the action against them and the plaintiff's claim is statute barred.

Background Facts

[3] The salient background facts are as follows:

(i) 7 September 1993	Olympia Land Bhd (OLB) letter of appointment appointing the plaintiff as consultant architect and the plaintiff duly accepting the appointment. (bundle B pp. 1-3)
(ii)	Plaintiff instructed the third defendant to demand from OLB the outstanding professional fees by relying on the following documents:
	(a) Letter of appointment dated 7 September 1993 (bundle B pp. 1-3);

		(b) Plaintiff's fee claims sent to OLB *via* letters, proforma bill and statements of account for the three developments undertaken by plaintiff. (bundle B pp. 38-44)
	(iii) 27 August 1999	Third defendant's letter to plaintiff requesting further documents and clarification. (bundle B p. 4)
		Plaintiff confirmed that he did not forward any other documents to the defendants. (Q&A6 of WS-plaintiff).
	(iv) 30 September 1999	Third defendant's letter of demand (LOD) to OLB demanding RM454,723.27. (bundle B pp. 6-7)
	(v) 3 February 2000	Third defendant's letter to Malaysian Institute of Architects (MIA) for appointment of an arbitrator thus commencing the arbitration proceeding. (bundle B p. 48)
	(vi) 14 June 2000	MIA appointed Jimmy Tham as the arbitrator. (bundle B p. 12)
	(vii) 10 August 2000	Plaintiff filed "points of claim" as per arbitrator's direction. (bundle B pp. 49-57)
	(viii) 15 September 2000	OLB filed "Point of defence", counterclaim and set-off. (Bundle B pp. 58-63)
	(ix) 11 October 2000	Plaintiff filed "reply and defence to counterclaim. (bundle B pp. 64-69)
	(x) 11 December 2000	Plaintiff's draft witness statement prepared by second defendant. (bundle B p. 17)

(xi)	5 January 2000	OLB's General Manager Ang Wan Hai's witness statement. (bundle B4 pp. 1-12)
(xii)	5 January 2001	OLB's solicitor wrote to the arbitrator raising the preliminary issue that the arbitration had been commenced against the wrong party.
(xiii)	8 January 2001	Plaintiff objected on the basis that the proposed issue departs from OLB's pleaded case. (bundle B3 p. 2)
(xiv)	10 January 2001	The arbitrator heard the preliminary objection and decided that the issue raised is a question of law. Therefore the arbitrator referred to the High Court. The arbitrator also stayed the arbitration proceeding. (bundle B p. 36)
(xv)	14 February 2001	OLB filed originating motion at Kuala Lumpur High Court R1-25-16-2001 ("OLB's motion").
(xvi)	10 September 2001	Third defendant's letter informing the plaintiff that unless he settles all the outstanding bills, the third defendant would not be able to continue acting for him. (bundle B1 p. 1) Specifically with regards to the originating motion, the second defendant told the plaintiff that third defendant will not be filing the affidavit in reply for the plaintiff in view of the outstanding bills. The plaintiff complained the third defendant's fees were too high and would appoint another lawyer to act for him. However due to the deadline to file affidavit in reply, the plaintiff requested the third

		defendant to prepare the affidavit under his instruction and promised to make partial payments. The second defendant obliged.
(xvii)	21 September 2001	Plaintiff affirmed an affidavit in reply stating that he was appointed by OLB and not MB Properties Sdn Bhd because: (a) letter of appointment was on OLB's letterhead; (b) All negotiation and instructions were from OLB; (c) All proforma and bills were issued to OLB without any objection; and (d) OLB has paid pursuant to the appointment. (bundle B p. 73)
(xviii)	8 November 2001	The third defendant's letter stating that they have not heard from the plaintiff's new lawyers and in view of the upcoming hearings, the third defendant was compelled to apply to discharge themselves from acting for the plaintiff. (bundle B p. 95)
(xix)	12 November 2001	Messrs Harcharanjit Singh & Associates' letter stating that they have instruction to take over conduct of all matters. (bundle B p. 94)
(xx)	29 November 2001	Defendant filed summons ("the summons") and affidavit in support ("the affidavit") to discharge themselves from acting for plaintiff since they did not receive any notice of change of solicitors. (bundle B p. 88)

(xxi)	30 November 2001	Defendant served the unsealed summons and the affidavit on the plaintiff by fax and personally served on 7 December 2001. Later on, the defendants served the sealed copies of summons and the affidavit on February 2002 to the plaintiff. (bundle B pp. 96, 98 and 99)
(xxii)	4 March 2002	Court allowed the third defendant's application to discharge. (bundle B p. 100)
(xxiii)	30 May 2002	Defendant served the sealed order on the plaintiff. (bundle B p. 102)
(xxiv)	16 April 2003	The High Court decided that OLB is the agent and employee of MB Properties Sdn Bhd and the plaintiff does not have a cause of action against the OLB for breach of contract and/or defaults of MB Properties. Mr Rejinder Singh represented the plaintiff. (bundle B2 p. 1)
(xxv)	20 October 2003	Messrs Rejinder Singh & Associates' (plaintiff's new solicitor) letter to the arbitrator informing the plaintiff's instruction to file an amended point of claim to include MB Properties as a second respondent to the claim. (bundle B2 p. 7) The plaintiff's new solicitors also requested a date for directions.
(xxvi)	22 December 2005	Meeting between parties, their counsels and the arbitrator. (bundle B2 p. 8)
(xxvii)	31 December 2005	The arbitrator's letter informing the parties' counsels that the matter of arbitration between parties be terminated forthwith based on terms of reference and jurisdiction of the

	arbitrator's appointment and the High Court's order. (bundle B2 p. 8)
(xxviii) 23 July 2007	Messrs San Leong (plaintiff's solicitor) sent a notice of demand to defendant. (bundle B1 p. 5)
(xxix) 26 July 2007	Defendant replied to the notice of demand. (bundle B1 p. 5)

[4] The plaintiff (PW1) was his own witness whilst the second defendant (DW1) testified on behalf of the defendants.

Findings

Defence Of Limitation

[5] The defendants contended the plaintiff's claim is time barred and the action ought to be dismissed on this ground alone as:

(i) the plaintiff's right to bring the action against the defendants is until 9 January 2007, ie, six years from the date of the commencement of the alleged cause of action;

(ii) the plaintiff pleaded in para. 6 of the statement of claim that on 10 January 2001 at the hearing of the arbitration proceedings the solicitors for OLB raised the preliminary issue that the proceedings were commenced against the wrong party. The plaintiff argued "Observing the spirit of the statement of claim, the plaintiff had acknowledged that on 10 January 2001 that the defendants were negligent for instituting arbitration proceedings against OLB and not against MB Properties Sdn Bhd", the alleged cause of action runs from 10 January 2001, the date when the plaintiff discovered the act of negligence of the defendants.

[6] The plaintiff disagreed with the defendants' submission contending (i) the issue "whether the claimant (the plaintiff) had commenced the arbitration proceedings against the correct party" is merely raised as an issue which has not been disposed yet and the cause of action did not accrue at 10 January 2001; and (ii) the cause of action only accrued on 16 April 2001 when the High Court declared the plaintiff had sued the wrong party; hence plaintiff's action is not time barred.

[7] The defendants disagreed and maintained that the plaintiff's action is time barred stating that the plaintiff pleaded in para. 17 of the statement of claim that the defendants breached their duty when they failed to apply to the statement of case when the preliminary issue was first raised.

[8] Section 6(1)(a) of the Limitation Act 1953 has been explained by the Supreme Court in *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 at p. 76:

> As stated earlier a cause of action is said to have accrued when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

[9] At its highest, in my judgment, the cause of action accrued when the High Court had on 16 April 2003 made the declaration that the plaintiff has sued the wrong party (bundle B pp. 1-6). Thus the plaintiff's right to bring the action only expired on 15 April 2009. Since the writ of summons was filed on 12 May 2008, the plaintiff's action is not time barred.

Issue Of Negligence

Nature Of The Defendants' Obligations Owed To The Plaintiff

[10] To reiterate, the plaintiff's claim is premised on negligence and breach of contractual duty on the defendants' part. As to what are the matters which the plaintiff must prove, I shall rely on the case of *Wong Kiong Hung & Anor v. Chang Siew Lan & Another Appeal* [2009] 3 CLJ 751 (cited by the defendants) where the Court of Appeal at p. 761 stated:

> [27] To succeed in the tort of negligence against the solicitor, it is incumbent on the client to establish that:
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> (1) the solicitor owes the client a duty of care;
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> (2) there is a breach of that duty by the solicitor;
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> (3) the client has thereby suffered damage; and
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> (4) the damage is not too remote a consequence of the breach.
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> (See eg, *Maelstrom Resources Sdn Bhd & Anor v. Shearn Delamore & Co And Another Case* [2007] 1 CLJ 50 HC, per Kang Hwee Gee J (as he then was)).

A [28] For the purpose of establishing a breach of contractual duty against the solicitor, the client must prove:

(1) the existence of a contractual relationship which expressly or impliedly imposes a contractual duty on the solicitor;

B (2) there is a breach thereof by the solicitor;

(3) the client has thereby suffered damage; and

(4) the damage is not too remote a consequence of the breach.

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[11] It is undisputed that there is a contractual relationship and a duty of care owed by the defendants to the plaintiff as per the evidence of the defendants' appointment as the plaintiff's solicitors to demand for outstanding professional fees coupled with the
D second defendant's testimony on confirmation of the appointment and that the third defendant had been representing the plaintiff since 2001 in various litigation matters. Therefore there existed contractual and tortious obligations between the defendants and the plaintiff.

E **[12]** In this case as there is the appointment of another solicitor involved, it is essential to determine until which time did the defendants owed these obligations to the plaintiff.

[13] The plaintiff contended that the contractual obligation
F remains subsisting as the defendants have withheld all the plaintiff's documents resulting in the plaintiff "could not pass the documents to the new solicitor."

[14] I find the defendants' contractual obligations ceased on the
G date the plaintiff affirmed and filed the affidavit on 21 September 2001 whereby the plaintiff and the defendants agreed that to be the last task to be undertaken by the defendants and the plaintiff shall appoint a new solicitor.

H **[15]** The defendants' obligation under tort ceased upon the service of the discharge order on 30 May 2002 (O. 64 r. 5(1) RC 2012). With regret I cannot accept the defendants' contention that notwithstanding O. 64 r. 5(1) RC 2012 their obligation under tort ceased when Messrs Harcharanjit Singh & Associates wrote
I (12 November 2001) to the defendant with instructions from the plaintiff to take over conduct of all of the plaintiff's matter including the present case. The reason being there was no notice

of change of solicitors filed by the intended new solicitor for the plaintiff which led to the defendants resorting to filing their application for discharge as solicitors on 29 November 2001.

[16] In my view the second defendant, as a solicitor retained by the plaintiff has a right to withhold the client's documents to protect their lien on the legal fees especially when she has been discharged by the plaintiff to act for him in accordance with r. 55 Legal Profession (Practice and Etiquette) Rules 1978 ("the Rules").

[17] With respect to the interpretation with r. 55, I agree with the reasoning of learned Chew Soo Ho JC (as he then was) in *Trikkon Sdn Bhd v. Mahinder Singh Dulku* [2010] 5 CLJ 850 and adopt the same for the present case. The case of *Trikkon Sdn Bhd (supra)* concerns an appeal by the appellant, Trikkon against the decision of the Bar Council's Advocates and Solicitors Disciplinary Board dismissing his complaints against the respondent as there was no merit. The appellant had two grounds of complaint, one ground was the respondent had withheld and refused to return the files involving the appellant's case for which the respondent was solicitor acting for the appellant in a High Court OS and Court of Appeal civil appeal, in breach of r. 55 of the Rules. His Lordship had analysed the two English cases of *Hughes v. Hughes* [1958] Probate Division 224 CA and *In re Faithfull, And In re London, Brighton, And South Coast Railway Company* [1868] Equity Cases Vol VI 325 cited by the respondent that he has a lien to retain the files for taxation of costs or settlement of costs with the solicitors for Penang Development Corporation, against whom the appellant appointed him to act. His Lordship held:

> [28] The principle of law quoted above *in tantum* is in line with r. 55 above which permits a lien to be claimed by an advocate and solicitor when it expressly provides such an exception to the withholding of client's papers to the detriment of the client when r. 55 uses the opening words of "except by way of securing his first to a lien, … (p. 862 paragraph 28);
>
> [29] … It is thus clear in law that respondent is entitled to a lien to retain the papers in the two files for taxation of costs still due to him after he had been discharged by the appellant as solicitor and when taxation has not been concluded. In the circumstances there is no obligation for the respondent to return the two files to the appellant. Hence, what the respondent did, ie, withholding the two files for the purposes

of securing his costs whether by taxation or through a settlement ultimately, is within the permissible purview of the law and cannot be held to have breached r. 55 thereof. (p. 863 B-C).

Whether The Defendants Breach The Duty Of Care

[18] The particulars of breach against the defendants are particularised as follows:

(i) Para 15 - ... that the Defendants had failed and/or omitted to study and peruse all documents pertaining to the said dispute between the Plaintiff, MB Properties Sdn Bhd and Olympia Land Berhad. (1st alleged breach);

(ii) Para 16 - In failing to do so, the Defendant had omitted to determine the name of MB Properties Sdn Bhd as the intended respondent and or as co-respondent in the arbitration proceedings;

(iii) Para 17 - ... in not having forthwith applied to amend the Plaintiff's statement of case before the arbitrator when the preliminary issue as to the proper and/or correct respondent was first raised at the arbitration proceedings. (para 16 and para 17 colllectively referred to as "2nd alleged breach").

[19] For the test of whether there was a breach of duty of care, this court is guided by the House of Lords case in *Caparo Industries Plc v. Dickman and Others* [1990] 1 All ER 568 approved by the Court of Appeal in *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585, namely the three criteria of foreseeability of damage, proximity of relationship and the reasonableness or otherwise of imposing the duty in conjunction with the line of cases respecting the standard of care expected of solicitors on the advices that they give to their clients (per Kang Hwee Gee J (as he then was) in *Maelstrom Resources Sdn Bhd & Anor v. Shearn Delamore & Co And Another Case* [2007] 1 CLJ 50 at p. 68 para. 59). In *Maelstrom Resources Sdn Bhd (supra)*, the plaintiff brought an action against the defendant, a firm of advocates and solicitors for negligence based on two legal opinions of the defendant regarding the patentability of an invention.

[20] The 'line of cases' respecting the standard of care expected of solicitors referred to by the learned judge at pp. 64-67 included principles of:

(i) A solicitor holds himself out to his clients as having adequate skill and knowledge properly to conduct business that he undertakes, whether contentious or non-contentious;

(ii) A solicitor is not guilty of negligence if he has merely acted upon his client's instructions in the reasonable belief that they were correct, or if he has fully explained the position to his client and is nevertheless instructed to proceed, or merely because he has committed an error of judgment, whether on matters of discretion or of law, for example on points of new occurrence or of doubtful construction.

(*Halsbury's Laws of England*: *The Law of Solicitor's Negligence*, para 152 and para 153, 4th edn. Reissue);

(iii) A solicitor has a duty to warn client of risks he is facing.

[21] Further in *Victor Cham & Anor v. Loh Bee Tuan* [2006] 3 CLJ 770; [2006] 5 MLJ 359 the Court of Appeal at p. 782 (CLJ) p. 368 (MLJ) of the report, examined the scope of duty of a solicitor toward his client by referring to *Midland Bank Trust Co Ltd & Anor v. Hett, Stubbs & Kemp* [1978] 3 All ER 582 at p. 583:

> Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing on solicitors, or on professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it on himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. *The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as Duchess of Argyll v. Beuselinck, Griffiths v. Evans and Hall v. Meyrick demonstrate that the duty is directly related to the confines of the retainer.*
> (emphasis added)

[22] The plaintiff submitted (i) the defendants had failed and neglected to take all reasonable steps expected of a solicitor to inspect all the relevant documents to ensure that the plaintiff has taken legal action against the right party, MB Properties Sdn Bhd

rather than Olympia Land Bhd (OLB); and (ii) the defendants as advocates and solicitors should have known there is no provision for amendments in arbitration proceeding under the Arbitration Act 2005 and the defendants should have filed a fresh arbitration proceeding against MB Properties Sdn Bhd which they failed to do when it became apparent from the objection taken by the solicitors for OLB. In support the plaintiff referred to the case of *Tan Sri Datuk Ibrahim Mohamed v. Leong Tuck Onn & Anor* [2012] 6 CLJ 662 at p. 674 para. 35 and submitted the defendants as legal advisers should have at all material times advise and warn the plaintiff-client as they are in a better position to do so.

[23] The case *Tan Sri Datuk Ibrahim Mohamed (supra)* can be distinguished in that the plaintiff proved the defendants failed to take reasonable steps which resulted in loss to him which is unlike the present case where the plaintiff failed to prove the defendants failed to take reasonable steps and I shall explain why it is not so.

[24] With respect to the plaintiff's argument of the first alleged breach, the plaintiff testified in examination-in-chief that the documents he brought for consultation with the third defendant were the documents at pp. 38-44 and pp. 1-3 bundle B, namely:

(a) the letter of appointment dated 7 September 1993 appointing the plaintiff in OLB's letter head (bundle B p. 1);

(b) the plaintiff's letter dated 20 December 1995 attaching fees claim for Hyatt Regency Hotel address to OLB (bundle B p. 38);

(c) the plaintiff's proforma bill dated 1 July 1996 addressed to OLB (bundle B p. 41); and

(d) the plaintiff's letter dated 21 June 1999 attaching statement of account for budget hotel, Hyatt Regency Hotel and Hotel Suite addressed to OLB (bundle B p. 40).

[25] The plaintiff confirmed that when the second defendant, Miss Chan Sock Mun, the lawyer who had undertaken the conduct of his matter, requested for further documents *vide* her letter dated 27 August 1999 (bundle B pp. 4-5), he answered "No".

[26] The plaintiff in cross-examination admitted that OLB appointed his services and all his dealings were with OLB as per the following evidence:

Q: True, you appointed by OLB?

A: Based on appointment letter at page 1-3. Yes, I agree.

Q: True, all your dealings including meetings with regards to the projects were with OLB?

A: Yes.

Q: That is also why you sent all your bills at page 38-39, page 40, page 41-44 to OLB?

A: Yes.

[27] The respondent in the arbitration proceedings ie, OLB admitted in their points of defence (bundle B pp. 58-63, in particular para. 1 at p. 58) that OLB appointed the plaintiff as the consultant architect.

[28] Based on the affidavit in reply affirmed by the plaintiff on 21 September 2001, to oppose OLB's notice of motion dated 14 February 2001 (bundle B pp. 73-87), OLB had exhibited at least 54 documents as can be gleaned from:

(a) Minutes of meeting held as deposed in para. 10 of the said affidavit as exhs. "A-7", "A-8", "A-9", "A-11", "A-15", "A-16", "A-19", "A-21", "A-22", "A-24", "A-25", "A-27", "A-29", "A-30", "A-32", "A-37", "A-38", "A-41", "A-43", "A-47", "A-48" and "A-49";

(b) Plans approved by the MB Properties Sdn Bhd as deposed in para. 14 of the said affidavit as exhs. "A-53" and "A-54".

[29] Based on the four documents submitted by the plaintiff to the defendant, I find any reasonable competent solicitor would have concluded OLB to be the rightful respondent because OLB was the contracting party in the light of the documents provided. However when the High Court on 16 April 2003 decided that OLB was the agent and employee of MB Properties Sdn Bhd, it had before it more documents (see para. 28 above) which the plaintiff failed to provide to the defendants at the time the defendants issued the letter of demand and when the defendants initiated the arbitration proceedings against OLB.

[30] With respect to the letter of appointment dated 7 September 1993, the plaintiff submitted "[I]f OLB were not acting as the agent for MB Properties Sdn Bhd or if MB Properties Sdn Bhd were not the principal for OLB, why at the instance the signature in the letter under OLB letterhead ... was to be signed by OLB, manager for MB Properties?". With respect, in my view the plaintiff is estopped from raising the issue of agency as it was not pleaded (*Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357 at pp. 369-371 and the cases referred therein).

[31] In the circumstances, I am of the view that the defendants have not failed to ascertain the proper party for the arbitration and there is no breach of their contractual or tortious obligations towards the plaintiff.

[32] The plaintiff's contention with regard the second alleged breach by the defendants cannot be sustained for the following reasons:

(a) The applicable Arbitration Act when the arbitrator made the decision to terminate the arbitration proceedings (bundle B2 pp. 8-9).

(b) The arbitration proceedings between the plaintiff and OLB was commenced based on the letter of appointment (bundle B p. 1) and the arbitrator was appointed pursuant to the letter of appointment to settle the dispute between the plaintiff and OLB.

(c) The High Court on 16 April 2003 ruled that OLB was not the contracting party with the plaintiff and the plaintiff has no cause of action against OLB. The arbitration proceedings between OLB and the plaintiff has come to an end and is not within the jurisdiction of the arbitrator's terms of reference and jurisdiction to add MB Properties Sdn Bhd as a co-respondent. In fact the arbitrator on 31 December 2005 had rejected the plaintiff's (represented by Mr Rejinder Singh) plea for amendment of the pleading but objected to by OLB's counsel.

(d) If the plaintiff wanted to adhere to the preliminary issue (ie, to admit that MB Properties Sdn Bhd and not OLB was the right party to the arbitration proceedings), the plaintiff will

have to file fresh arbitration proceedings against MB Properties Sdn Bhd and not amend the existing statement of case to add MB Properties Sdn Bhd as a co-respondent.

Whether There Is A Causal Link Between The Breach Of Duty Of Care And The Loss Suffered

[33] The plaintiff pleaded that due to the defendants' breach ie, failure to determine MB Properties Sdn Bhd as the respondent and failure to forthwith amend the statement of case, the plaintiff was denied the opportunity to amend the statement of case after the decision of the Kuala Lumpur High Court and thus the claim for the sum of RM454,723.27 was time barred (paras. 16, 17, 18 and 19 statement of defence).

[34] Having now established that the defendants have not caused any breach of duty of care to the plaintiff, the next question is, in the event I err on this point, whether there is any break in the chain of causation.

[35] By "causation" the plaintiff must show there is a causal link between the loss he has suffered and the defendant's wrong (*Winfield and Jolowicz on Tort*, 17th edn., 2006 at p. 267).

[36] In *Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 1 CLJ 409, the issue before the Federal Court was whether the 'but for' test was applicable in a negligence action where there were overlapping factors causing harm to the plaintiff. The Federal Court at p. 410 held:

(1) In a negligence claim, there must be a link between the wrongdoing and the damage caused. The burden of proving this link is on the plaintiff. In establishing this link there can be other possible causes. The 'but for' test does not identify all of the possible causes of a particular incident, but focuses on the effective cause of damage in order to assign responsibility for the damage caused. Where combined or several causes contribute to the wrongdoing or harm, the 'but for' test is not suitable. *Bonnington Casting Ltd v. Wardlaw* (foll); *Lembaga Letrik Negara, Malaysia v. Ramakrishnan* (foll); *Majlis Perbandaran Ampang Jaya v. Stephen Phoa Cheng Loon & Ors* (refd). (paras 30-33).

(2) The 'but for' test is not the exclusive test to determine causation of the injury. Where several acts, events or factors cause harm to the plaintiff, the 'but for' test is not to be applied to determine causation. The test in such

A circumstances is to determine which of those acts, events or factors materially contributed to the plaintiff's injury. What is a material contribution is a question of degree for the court to decide upon. However, trifling contributions or contributions which come within the exception of *de minimis non curat lex* are not material. *Bonnington Casting Ltd v. Wardlaw* (foll); *Fairchild (suing on her behalf) etc v. Glenhaven Funeral Services Ltd & Ors, etc* (foll); *March v. E & M H Stramare Pty Ltd & Anor* (refd). (paras 34-37).

[37] Applying the principle of 'material contribution' rather than the 'but for' test enunciated in the case of *Wu Siew Ying (supra)* to the factual matrix of the present case and mindful that what is a material contribution is a question of degree for the court to decide, these are my findings on this point.

[38] There were many intervening acts which occurred from the raising of the preliminary objection raised by OLB's solicitors (10 January 2001) till the Kuala Lumpur High Court decision on 16 April 2003. The defendants discharged themselves as solicitors representing the plaintiff on 30 May 2002 (sealed order of discharge as solicitors served on plaintiff). Hence thereafter, the defendants' duty and responsibility as solicitors to the plaintiff ends. This means that the defendants cannot be held responsible for the events happening after 16 April 2003 as in the delay in amending the plaintiff's statement of case which was undertaken by the new solicitors on 20 January 2003. The application was rejected by the arbitrator on 31 December 2005, about three and a half years after the defendants discharge. In any event I reiterate what I have stated at para. 16 above that the plaintiff adopted the wrong procedure as they will have to file fresh arbitration proceedings against MB Properties Sdn Bhd and not amend the existing statement of case to add MB Properties Sdn Bhd as a co-respondent.

[39] As to the plaintiff's contention that the plaintiff's claim was time barred on 20 June 2005 since the plaintiff's claim for the sum of RM454,723.27 arose on 21 June 1999, this would mean the plaintiff's claim was time barred three years after the defendants' discharge. In any event, it is the court's finding that the plaintiff's cause of action commenced from 16 April 2003 when the plaintiff then knew the contracting party was MB Properties Sdn Bhd and not OLB.

[40] For the reasons given even if can be argued that the defendants breached their duty of care (which I held otherwise), I find there is a break in the chain of causation through the defendants' discharge and the appointment of new solicitors by the plaintiff.

Plaintiff Has Not Proven His Loss

[41] Assuming that liability against the defendants has been proven, the court will now consider whether the plaintiff has proven his losses. The plaintiff basically acknowledged that negligence is not actionable *per se* and it is necessary for a plaintiff to prove the damages suffered due to breach of duty of care on part of a defendant. However the plaintiff submitted in the present case the loss has actually been proven and there is no need to prove loss again and this is not a trial to prove loss as the defendants know the loss suffered by the plaintiff. The plaintiff's reasoning is that the amount of damages of RM454,723.27 is a claim initiated by the defendants against OLB and the claim has been prepared and the sum has been sent out by the defendants.

[42] With respect I find the plaintiff's submission is totally misconceived. The plaintiff has failed to plead the particulars of the loss suffered by him and merely pleaded generally "The plaintiff has been denied the opportunity of its claim in the sum of RM454,723.27 ...".

[43] It is for the plaintiff to prove orally and by documentary evidence that the sum of RM454,723.27 claimed by him in fact constituted the outstanding architect/consultant fees payable under the letter of appointment for work done and services rendered to his client. All the plaintiff had was the letter of demand dated 30 September 1999 sent out by the defendants upon his instructions demanding from his client the sum of RM454,723.27, his letter dated 21 June 1999 forwarding to OLB his statement of claim amounting to RM454,723.27 as fees payable for (i) the proposed budget hotel - RM113,786.37, (ii) proposed Hyatt Regency - RM139,028.20 and (iii) proposed Hotel Suite - RM201,908.70 and the points of claim in particular para. 22.

[44] When cross-examined regarding the statement of accounts for the three development projects (bundle B pp. 42-44) for the said amounts totalling RM454,723.27, the following evidence was elicited:

Budget Hotel - Statement of Account at page 42 Bundle B4

(a) The construction cost for Phase 1 and 2 is in excess of the actual construction cost by referring to the Plaintiff's own document at page 23 Bundle B4; and

(b) The Plaintiff has received a total payment of RM550,864.24 by referring to payments in pages 21, 23, 26, 28 and 65 in contrary to the RM498,362.24 admitted by the Plaintiff in the said statement of account.

Hyatt Regency Hotel - Statement of Account at page 43 Bundle B4

The Plaintiff failed to produce any approved plan to justify their claim for 10% as stated in the Statement of Account and OLB has pleaded that no new plans and designs for Hyatt Hotel was submitted by referring to page 60 of B2.

Hotel Suites - Statement of Account at page 44 Bundle B4

(a) The Plaintiff agreed that 50% discount is to be given on his consultancy fees for this Hotel as it is a duplication of work done in Budget Hotel by referring to pages 38-39 of B4 contrary to the claim of full consultancy fees in the Statement of Account; and

(b) The construction cost for Phase 1 and 2 is in excess of the actual construction cost by referring to the Plaintiff's own document at pages 43-44 Bundle B4.

Therefore I find the plaintiff has failed to prove that the sum of RM454,723.27 was in fact due and owing to him by his client.

Conclusion

[45] On a balance of probabilities the court held the plaintiff has not proven his claim. The plaintiff's claim was therefore dismissed with costs fixed at RM60,000.